IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

IN THE MATTER OF THE PETITION OF THE EQUITABLE TRUST COMPANY OF NEW YORK, AS TRUSTEE, FOR A WRIT OF MANDAMUS TO BE ISSUED AND DIRECTED TO HONORABLE WILLIAM C. VAN FLEET, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, AND TO SAID DISTRICT COURT.

EX PARTE EQUITABLE TRUST COMPANY OF NEW YORK, AS TRUSTEE OF THE FIRST MORTGAGE OF THE WESTERN PACIFIC RAILWAY COMPANY, PLAINTIFF IN THE ACTION OF EQUITABLE TRUST COMPANY OF NEW YORK, AS TRUSTEE, AGAINST THE WESTERN PACIFIC RAILWAY COMPANY.

THE EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee,
Appellant,
against
WESTERN PACIFIC RAILWAY COMPANY, et al.,
Respondents.

STATEMENT OF FACTS.

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Filed this.....day of March, 1916.

F. D. MONCKTON, Clerk.

By....., Deputy.

THE JAMES H. BARRY CO.

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Respondents.

STATEMENT OF FACTS.

PROCEEDINGS BETWEEN PARTIES TO THE SUIT IN THE COURT BELOW.

On the 2nd day of March, 1915, The Equitable Trust Company of New York, as Trustee, filed its bill in the District Court of the United States for the

Northern District of California for the foreclosure of the First Mortgage of the Western Pacific Railway Company, bearing date September 1, 1903, but acknowledged and delivered June 23, 1905, and for the appointment of a Receiver, *pendente lite,* of the property covered by the mortgage; the jurisdiction of the court being based upon diversity of citizenship. Although the bill set forth that the entire amount of $50,000,000 of bonds secured by the mortgage sought to be foreclosed had been duly issued and were then outstanding, the only default alleged was in the payment of one semi-annual instalment of interest matured March 1, 1915, amounting to $1,250,000; and that amount only was alleged to be due and unpaid. The prayer of the bill so far as it related to foreclosure was in the usual form; and so far as it related to the appointment of a receiver was:

> "That a receiver may be appointed to take possession of and to operate the properties of defendant which are *subject to the lien of such First Mortgage* and to collect and receive the tolls, earnings, revenue, rents, issues, profits and other income thereof and to apply the net income thereof to the benefit of the holders of bonds secured by such First Mortgage as provided by the terms thereof, and with such other powers and authority and limitations of power and authority as to this honorable court shall seem proper."

On the same day the Western Pacific Railway Company, then the sole defendant in the suit insti-

tuted by the filing of such bill, filed its answer admitting all the allegations of the bill; and, on the following day, the court made its order in the cause appointing Warren Olney, junior, and Frank G. Drum as Receivers, and they duly qualified and are still acting as such. At the time of its appointment of such Receivers, the court of its own motion designated John S. Partridge as counsel for the Receivers and he is still acting as such.

The order appointing the Receivers made them joint receivers of all the property of the Railway Company and directed them to take immediate possession and to protect the title and possession thereof and to continue the operation of the railway. It authorized and empowered the Receivers "to institute " and prosecute all such suits as may be necessary in " their judgment for the proper protection of the " property and trust hereby vested in them, and like- " wise to defend such actions as may be instituted " against them as such Receivers, and also to appear " in and conduct the prosecution or defense of any suit " now pending in any court against Western Pacific " Railway Company, or any company operated by, " for, or in the interests of said Railway Company, " the prosecution or defense of which will, in the judg- " ment of said Receivers, be necessary for the proper " protection of the property placed in their charge " for the interests and rights of the creditors con- " nected therewith."

On the 30th day of March, 1915, the plaintiff in the suit duly filed its amended bill containing substantially the same averments as those of the original bill and praying for relief in substantially the same terms; and on the 9th day of April, 1915, the Western Pacific Company, being still the sole defendant in the suit, filed its answer admitting all the allegations of the amended bill. The prayer of the amended bill, so far as it related to the appointment of a Receiver, was:

> "That a Receiver or Receivers be appointed to take possession of the railroads, property and franchises of the Defendant Railway Company, *covered by the said First Mortgage,* and the earnings, income and proceeds thereof, with power to operate the said property, and with all such powers and authority as may be required to preserve the same until the sale thereof, as the same may be decreed and ordered by this honorable court, and to secure the earnings of said railroads, property and franchises to the use of your orator and of the holders of said bonds, with such powers and authority as are usually possessed by Receivers in like cases, as this honorable court may direct."

On the 25th day of October, 1915, Central Trust Company of New York, having, through intervention, become a party to the suit, filed its answer and cross-bill therein. This answer in the main merely put the plaintiff to proof of the facts set forth in its amended bill, but in view of the stipulation heretofore made by Central Trust Company of New York,

consenting to a decree of foreclosure and sale, as hereinafter will appear, the contents of its answer are not now material. And the contents of its cross-bill are not material further than that they show:

1. That it is the trustee under the Second Mortgage of Western Pacific Railway Company.

2. That such Second Mortgage covers all the properties of Western Pacific Railway Company, but is subject and subordinate to the First Mortgage under foreclosure in this suit.

3. That there have been issued and are outstanding under such Second Mortgage bonds aggregating in par value $25,000,000 which bear interest at 5% per annum.

4. That under the terms of such Second Mortgage and because of the order appointing receivers of the property of the Western Pacific Railway Company, said Central Trust Company is entitled to foreclose such Second Mortgage and collect the entire amount, principal and interest, secured thereby.

On the 1st day of November, 1915, The Equitable Trust Company, as Trustee, filed its answer to such cross-bill, admitting, so far as is now material, all the averments thereof; and on the 22nd day of November, 1915, the Western Pacific Company filed its answer to such cross-bill admitting all the allegations thereof.

On the 13th day of January, 1916, the plaintiff, The

Equitable Trust Company, filed its supplemental and second amended bill. The supplemental portion consisted of averments that since the filing of the amended bill the defendant Railway Company had come into default in the payment of a second instalment of interest, due September 1, 1915; and that, because of the duration for a period of six months of the default of the Railway Company in its payment of the instalment of interest due March 1, 1915, the plaintiff, as Trustee under the mortgage and acting in accordance with its provisions, had declared the principal of the $50,000,000 of outstanding bonds to be due, and that that principal amount also was in default.

The amendment part of the supplemental and second amended bill set forth that the Boca and Loyalton Railroad Company, Mercantile Trust Company of San Francisco, as Trustee under its First Mortgage, and Chester L. Hovey, as Receiver of the property of said Boca and Loyalton Company, appointed by a Superior Court of California in an action instituted by such trustee for the foreclosure of such Boca and Loyalton mortgage, claimed an interest in about three and three-quarters miles of track of the Western Pacific Railroad and that this interest was subsequent to and inferior to the First Mortgage of the Western Pacific Company.

On the 27th day of January, 1916, the Western Pacific Company, on the 3rd day of February, 1916, the Boca and Loyalton Company, and on the 1st day

of March, 1916, the Central Trust Company filed respectively their respective answers admitting the averments of the supplemental and second amended bill of complaint, and on the 1st day of March, 1916, the Mercantile Trust Company of San Francisco, as Trustee, and Chester L. Hovey, as Receiver, filed their respective answers thereto. The answers of these two defendants last named were limited to an assertion of a priority over the lien of the First Mortgage of Western Pacific Company of the interest of the Boca & Loyalton Company in the three and three-quarters miles of track in question.

On the 1st day of March, 1916, therefore, there was only one justiciable controversy in the cause between any of the parties to it; and that consisted of the question whether the existing right of the Boca and Loyalton Company to the railroad use jointly with the Western Pacific Company of three and three-fourths miles out of the more than eight hundred miles of the Western Pacific Railroad would survive the foreclosure of the Western Pacific Company's First Mortgage. Even that controversy was eliminated.

On the 6th day of March, 1916, at the opening of a General Term of the United States District Court for the Northern District of California, the solicitor for the plaintiff, The Equitable Trust Company, filed in the cause and submitted to the court the following stipulations:

1. A stipulation between the plaintiff and the de-

fendants Western Pacific Company and Central Trust Company waiving the right to take testimony, admitting the truth of the facts set forth in the amended bill and in the supplemental and amended bill and recited in a form for a decree for foreclosure and sale attached to the stipulation, and consenting to the entry forthwith, or at the time of such early hearing as the Court should assign, of a decree in the form annexed to the stipulation.

2. A stipulation between the plaintiff and Boca and Loyalton Railroad Company, Mercantile Trust Company of San Francisco as Trustee, and Chester L. Hovey as Receiver, that a decree of foreclosure and sale might be entered forthwith upon condition that there should be contained in such decree a provision that such sale should be made subject to all then existing rights of such defendants to a trackage right over the three and three-fourths miles of track before referred to. And the form for a decree attached to the stipulation with the Western Pacific Company and Central Trust Company then submitted to the court contained such a provision framed to the satisfaction of the Boca and Loyalton interests.

3. Stipulations by the Southern Pacific Company and the Utah Fuel Company respectively who are the only claimants against the Western Pacific Company, its property or its Receivers who have presented their claims in the cause as preferred claims, and whose

claims have not been paid, consenting to the entry of a decree of sale in accordance with the prayer of the amended bill and the supplemental and amended bill, and consenting to the setting of the cause for hearing. Probably these stipulations of creditors were not necessary because provision was made in the form for a decree submitted to the Court for all claims which may be established against the Western Pacific, its Receivers or its property.

The solicitor for the plaintiff then moved the court that a decree of foreclosure and sale in the form submitted should be entered forthwith; and, in the alternative, if that motion should be denied, that the cause be set for hearing and for the entry of such decree at such early day as the court should assign. In support of the motions, the solicitor for the plaintiff filed and submitted and read to the court two affidavits—one made by himself setting forth, among other things, that all parties or persons interested had consented that a decree of foreclosure and sale should be entered forthwith and that all creditors whose claims had been presented and allowed had been paid in full, and the other made by John F. Bowie, counsel for the Reorganization Committee of Holders of First Mortgage Bonds of the Western Pacific Company setting forth the following facts: That a Bondholders' Protective Agreement had been framed under date May 1, 1915; that on the 15th day of December, 1915, the holders of more than $37,000,000 of such bonds had deposited

them under the Agreement and thereupon and under that date a Plan and Agreement for Reorganization had been framed under which the holders of more than $43,000,000 of such bonds have deposited them; that in order to procure the underwriting required by such Plan and Agreement for the sale of $20,000,000 principal amount of bonds to be issued thereunder, the Committee had procured an undertaking of certain bankers to secure an Underwriting Syndicate Agreement; that said undertaking had been performed and said Underwriting Syndicate Agreement had been made; that by the terms of the Plan and Agreement it must be declared operative before March 15, 1916; that by the terms of the Underwriting Agreement, that agreement expires July 1, 1916; that it is necessary, in order to carry out the Plan and Agreement, that the properties covered by the Western Pacific Company's First Mortgage shall be sold and all steps necessary for the enjoyment of the benefits of such Underwriting Agreement shall be taken before July 1, 1916; that if the Plan and Agreement shall be declared operative and shall fail through delay in the entry of a decree for foreclosure and sale, the bondholders who are parties to it must become liable for the sum of $500,000 for underwriting and banking commissions over and above the sum of over $250,000 for expenses incurred in framing the Plan and Agreement and obtaining deposits under it; that the Plan provides for the making of large extensions to the railroad out of the

funds provided to be raised by the bond issue and that if the Plan shall fail, the money can be again procured only on much less favorable terms if at all; that the continuance of the receivership is unnecessary and will involve heavy and unnecessary expense.

Copies of the Protective Agreement, the Plan and Agreement for Reorganization and the Underwriting Syndicate Agreement respectively were attached to this affidavit.

This statement has set forth all proceedings in the suit of the parties to it. It has shown that whatever controversies had arisen in the suit, as between the parties to it or any two of them, were comparatively trivial in character and had, on the 6th of March, 1916, been eliminated; and that all parties to the action were desirous of a decree of foreclosure and sale in the form submitted to the court; and that no creditors objected thereto and that the only creditors who had asserted preferred claims which had not been paid had expressly consented to the entry thereof.

PROCEEDINGS CONCERNING CONTRACT B.

The statement has not, however, referred to certain other controversies which have arisen in the cause and are still active—controversies between the court and the plaintiff, in which no other party to the suit was or is involved, and which have been injected into the suit by the court either of its own volition or upon the initiative of counsel for the Receivers. It is to these controversies, and not to any controversy be-

tween the parties to the cause in the District Court, that the attention of this Court is invited in the proceedings now before it. No party to the suit, or interested in the result of the suit, has opposed or will oppose the granting of the relief prayed by The Equitable Trust Company. The real question before this court is whether, there being no debts of the court or its Receivers to be considered, the receivership may, as a matter of right, be terminated at the request of the plaintiff, through the action of which the receivership was installed, and by consent of all parties interested.

These controversies center about what is commonly called Contract B; and at this juncture, and before taking up the procedure of the court in the matter of the motions for the making and entry of a decree of foreclosure and sale, it appears to be desirable to describe those controversies, and as clearly as possible, how they arose.

On the 18th day of May, 1915, the Receivers filed their petition asking for six months time within which to present to the court all matters and things in connection with certain contracts specifically mentioned, and any other contracts, relations or arrangements, with the Denver and Rio Grande Railroad Company. It is apparent upon the face of the petition that the Receivers merely asked for extended time, beyond that usually allowed, within which to adopt or disaffirm the contracts in question; and the

petition prayed that pending the examination by the Receivers of these contracts, they might be allowed to continue them in effect without prejudice. An order was made and entered fixing June 14, 1916, as the time for the hearing upon the petition. Among the contracts specifically mentioned in the petition was Contract B.

Contract B was entered into under date June 23, 1905, (being the same day upon which the First Mortgage of the Western Pacific Company was executed) between the Denver and Rio Grande Railroad Company (called the "Denver Company") and The Rio Grande Western Company (called the "Western Company"), as parties of the first part, Western Pacific Railway Company (called the "Pacific Company"), as party of the second part, and Bowling Green Trust Company, as Trustee under the First Mortgage of Western Pacific Railway Company (called the "Trustee"), as party of the third part. (The Equitable Trust Company of New York is the successor to Bowling Green Trust Company as Trustee under the First Mortgage of Western Pacific Railway Company; and the Denver and Rio Grande Railroad Company and The Rio Grande Western Railway Company have been consolidated into the present The Denver and Rio Grande Railroad Company.)

Contract B recites:

(a) that the Denver Company operates a railway line from Denver, Colorado, westerly to Grand Junction, Colorado, at which point it connects with a railway operated by the Western Company from Grand Junction, Colorado, westerly via Salt Lake City, Utah, to Ogden, Utah, connecting at Salt Lake City with the railway of the Pacific Company;

(b) that the Pacific Company has partially constructed, and is constructing the remainder of, a railway from San Francisco easterly to Salt Lake City, at which point the portion already constructed connects with the railway of the Western Company;

(c) that the Denver Company owns substantially all the stock of the Western Company, and the Denver Company and the Western Company, together, own a majority of the authorized stock of the Pacific Company;

(d) that there is no line of railway which furnishes an outlet for either the Denver Company or the Western Company to the Pacific Coast that is not controlled by a competitor;

(e) that the Pacific Company has authorized an issue of $50,000,000 bonds for the purpose of completing its railway, interest upon which at five per cent. per annum is to be payable semi-annually on the first day of March and of September, and to secure the payment thereof has authorized its First Mortgage to the Trustee upon its railway property, owned or to be acquired, and by said mortgage has covenanted to create a sinking fund to consist of $50,000 to be paid to the Trustee during the year beginning September 1, 1910, and each year thereafter until the bonds shall be wholly paid;

(f) that the Pacific Company intends to pledge its interest under this agreement under such First

Mortgage to the end that it may be enabled to sell its bonds at a higher price.

Contract B provides:

(1) that the railways owned and operated by the respective railway companies, parties to the contract, shall be operated as a joint transportation system for all purposes;

(2) that whenever the Pacific Company shall not have sufficient freight equipment to perform its part in the operation of these three railways as a joint transportation system, the Denver Company and the Western Company shall furnish such additional cars as shall be required (Art. II, par. 2);

(3) that the Pacific Company shall apply all its gross earnings and income to the payment of its operating expenses, its taxes, the interest on its bonds, its contribution to the sinking fund provided by its First Mortgage, and any other charge or expense which it may be necessary for it to pay in order to assure the continued and efficient operation of its property and to protect the priority of its First Mortgage (Art. III, par. 5);

(4) that the Denver Company and the Western Company shall purchase and pay for at par the five per cent. demand promissory notes of the Pacific Company to the amount by which in each half-year the gross earnings and income of the Pacific Company shall be insufficient to meet the sum of the payments enumerated in (3); (Art. II, par. 4 (a));

(5) that the Denver Company and the Western Company shall promptly pay the purchase price of all notes agreed to be purchased by them even though the Pacific Company shall not, at the time of such payment, have ready for delivery, or for any other reason shall fail to deliver, such notes (Art. II, par. 4 (e));

It has been claimed by the solicitor for The Equitable Trust Company in argument before the court below and will be claimed here that the contents of Contract B, as so far recited, create a complete and sufficient agreement between the Denver Company and the Western Company, on the one hand, and the Pacific Company, on the other hand; and, for convenience in the argument upon that question, that agreement will be identified as "the traffic agreement."

But there is more to Contract B than has been set forth above. It provides further:

> (6) that the Denver Company and the Western Company shall pay to the Trustee, out of the purchase price of said notes, at certain times in each half-year specified,
>
> (a) such amount as will, with the amount actually appropriated and paid over by the Pacific Company for that purpose, be sufficient to pay the interest for such current half-year upon the Pacific Company's First Mortgage bonds; and (b) such amount as will, with the amount actually appropriated and paid over by the Pacific Company for that purpose, be sufficient to meet the sinking fund payment, if any, provided by such mortgage to be made during such current half-year (Art. II, par. 4 (b));
>
> (7) that the measure of the amount to be paid to the Trustee by the Denver Company and the Western Company as provided by (6) (a) shall be the difference between the amount necessary for the payment of a semi-annual instalment of interest on the Pacific Company's First Mortgage bonds and the sum of the amount held by the Trustee and of

the amount actually paid over by the Pacific Company to its fiscal agent for that purpose; and that the measure of the amount to be paid by the Denver Company and the Western Company as provided by (6) (b) shall be the difference between the amount necessary for the making of a sinking fund payment required to be made in the current half-year, if any, and the amount in the hands of the Trustee for that purpose (Art. VI, par. 7).

This portion of Contract B, which will be identified for convenience in argument as "the agreement of suretyship," has been claimed by the solicitor for The Equitable Trust Company in argument before the court below and will be claimed here to be a complete agreement of itself and to be wholly independent of the traffic agreement; and it has been claimed and will be claimed here that the benefits of the traffic agreement run primarily to the respective railroad companies, parties to Contract B, while the benefits of the agreement of suretyship run directly and primarily to the Trustee.

There are still other provisions in Contract B without a recital of which this statement would not be complete. It provides further:

(8) that "the pledge to the Trustee of all the rights, benefits and advantages *to which the Pacific Company may be entitled hereunder* contained in said First Mortgage of the Pacific Company is hereby assented to, ratified and confirmed" (Art. VI, par. 15);

(9) that any of the provisions of the agreement excepting those set forth in (6) may be abrogated

or modified by a written agreement of all the parties, providing it shall have the written approval of holders of outstanding bonds of the Pacific Company to the amount of two-thirds of the authorized issue thereof; but that the obligation of the Denver Company and the Western Company to make the payments provided for in (6) shall never be abrogated or modified until all of the bonds secured by the First Mortgage of the Pacific Company shall be paid in full or until they shall be called for redemption and provision made for their payment as provided in the mortgage (Art. VI, par. 14);

(10) that in the event of default by the Pacific Company under its First Mortgage the Trustee shall, upon written request of the holders of two-thirds in amount of outstanding bonds secured by the mortgage, terminate the agreement; "but such termination of this agreement shall not be deemed to and shall not release, nor shall anything else done hereunder release, the rights of the Trustee or of the holders of the First Mortgage bonds of the Pacific Company to the benefits of the agreements of the Railway Companies, parties of the first part, to make the payments" provided for in (6) (Art. VI, par. 14);

(11) that the agreement shall, unless modified or abrogated as provided in (9) and (10), endure until all the First Mortgage bonds of the Pacific Company shall be paid and shall run with the railways of the said railway companies, parties to it, into whosesoever hands they may come (Art. VI, par. 13);

(12) that the refusal, neglect or other failure of the Pacific Company to perform any or all the covenants, agreements or conditions herein contained by it to be performed shall not constitute ground for the rescission of or refusal to perform or delay in performing this contract by the Denver Company and the Western Company or either of

them; but that in the event of any such refusal, neglect or failure on the part of the Pacific Company, the Denver Company and the Western Company or either of them may have resort to such remedy by suit for specific performance or action for damages as may be appropriate. But nothing in the contract contained shall be taken to authorize any action that shall have the effect of impairing in any manner or to any extent the lien of the First Mortgage of the Pacific Company or of preventing, obstructing or interfering with the exercise of any of the remedies thereby granted to the Trustee (Sec. VI, par. 10).

(13) that all amounts payable to the Trustee by the Denver Company and the Western Company for the purpose of providing for the payment of interest shall constitute a trust fund; and that the Pacific Company shall not be entitled to any interest in, or claim to, any part of it (Art. II, par. 4 (d)).

(14) that the Trustee shall, upon request of any holder of the Pacific Company's First Mortgage Bonds, enforce the provision of the contract requiring the Denver Company and the Western Company to pay it money.

CERTAIN PROVISIONS OF THE MORTGAGE.

Contract B was executed and delivered simultaneously with the execution and delivery by the Western Pacific Company of its First Mortgage now under foreclosure in the suit below.

By this mortgage the Western Pacific Company transferred and assigned to the Trustee all the property of the Company, then owned or thereafter to be

acquired, for the purpose of securing the payment of the principal and interest of its bonds to be issued thereunder and to secure the performance of its covenants therein contained. Included within this property were *the rights which the Railway Company then owned* or should acquire in Contract B, which was particularly and fully described in a granting clause of the mortgage; and, of course, the transfer and assignment by the Western Pacific Company of Contract B could be only of its own rights under the contract. The pledge to the Trustee of rights under the contract which, by the terms of the contract itself, the Trustee already fully possessed would have been utter supererogation.

The mortgage contains covenants on the part of the Company, usual in mortgages, and provides, upon default in any such covenant, for a sale by the Trustee at public auction, or for a sale under judicial proceedings, of all and singular the mortgaged property held by the Trustee

> "except only the right of the Trustee and of the holders of the bonds secured hereby under said agreement between The Denver & Rio Grande Railroad Company, The Rio Grande Western Railway Company, Western Pacific Railway Company and Bowling Green Trust Company, to require said two first named companies and each of them to make any payment or payments of money to the Trustee, and to recover damages from said companies or either of them in default of any such payment or payments, which said rights and all

rights secured by said agreement necessary for the enjoyment and enforcement of such rights shall remain in and survive to the Trustee for the benefit of the holders of the bonds secured hereby, after and despite any and every sale made by virtue of this indenture, whether under the power of sale hereby granted and conferred or pursuant to judicial proceedings" (Art. V, Sec. 3).

The mortgage provides further that, upon the completion of any sale, the Trustee shall deliver to the purchaser all agreements held by it and sold to such purchaser, with proper assignments thereof,

"provided, however, that so long as The Denver and Rio Grande Railroad Company and The Rio Grande Western Railway Company, or either of them, shall, by the terms of their said agreement with the Railway Company and the Trustee, be under obligation to make any payment or payments to the Trustee either for the purpose of providing funds wherewith to make payments of interest upon the bonds secured hereby or wherewith to make any payment into the sinking fund hereby provided for, the Trustee shall not deliver said last mentioned agreement to any such purchaser or purchasers, although such purchaser or purchasers may have succeeded to any or all the interests and rights of the Railway Company thereunder." (Art. V, Sec. 9);

and, further, that

"after any sale or sales, whether under the power of sale hereby granted or pursuant to judicial proceedings, any and all moneys that may be received by the Trustee under the provisions of said agreement between The Denver and Rio Grande Rail-

road Company, The Rio Grande Western Railway Company, Western Pacific Railway Company and Bowling Green Trust Company, intended to provide the Trustee with moneys wherewith to pay interest upon the bonds secured hereby, shall forthwith be applied by the Trustee to the payment pro rata of the interest upon such of the bonds secured hereby as shall then remain unpaid in whole or in part whether or not the same shall have been reduced to judgment; and any and all moneys that may be received by the Trustee, after any such sale or sales, under the provisions of said agreement intended to provide the Trustee with moneys wherewith to make payments into the sinking fund hereby established shall forthwith be applied by the Trustee to the payment pro rata of the amounts remaining due for principal and interest upon the bonds secured hereby and then unpaid in whole or in part" (Art. IV, Sec. 9).

DEPENDENT SUIT IN SOUTHERN DISTRICT OF NEW YORK.

On the 26th day of May, 1915, The Equitable Trust Company of New York, as Trustee, filed, in the District Court of the United States for the Southern District of New York, its bill, ancillary to the original bill theretofore filed in this cause in the court below, and obtained an ancillary order appointing Warren Olney, junior, and Frank G. Drum as Receivers of the properties of Western Pacific Railway Company in that jurisdiction. And on the following day it filed in the same court its dependent bill against The Denver and Rio Grande Railroad Company, Western Pacific Railway Company and certain

other fictitiously named defendants. This dependent bill was filed by the Equitable Trust Company as Trustee at, and in conformity to, the express request of the holders of more than a majority of the bonds outstanding and secured by such First Mortgage of the Western Pacific Company, and in performance, therefore, of the strict duty imposed upon it by the terms of its trust.

The dependent bill sets forth the suretyship agreement of the Denver Company as contained in Contract B; and the entire default of the Western Pacific Company and the Denver Company in respect of the semi-annual instalment of interest upon the First Mortgage Bonds of the Western Pacific Company due March 1, 1915; and entire default of both companies in respect of the sinking fund requirements under such First Mortgage; and that such sinking fund requirements were for the deposit with the Trustee under the First Mortgage of the sum of $50,000 on the 1st day of September in each year, beginning with the year 1910, and aggregated at the time of filing the bill the sum of $250,000. It set forth also that Contract B provided that the agreement of the promising railroad companies should continue in force until all the First Mortgage Bonds of the Western Pacific Company, principal and interest, should be fully paid and should run with the railroads of said railway companies. It set forth further the beginning of suits for foreclosure of the

Western Pacific Company's First Mortgage and the appointment of Receivers in the original jurisdiction of the Northern District of California and the ancillary jurisdictions of the District of Utah and the Southern District of New York; that the principal of the First Mortgage bonds would soon be declared to be due; that a sale of the mortgaged properties would, in the orderly course of procedure, be had at an early day; that it was expected that such sale would realize substantially less than the amount of bonds secured by the mortgage, principal and interest; that the Western Pacific Company was insolvent; and that recourse must therefore be had to the Denver Company for the payment of the debt.

Proceeding upon the assumption that the amount of the liability under Contract B of the Denver Company to the Mortgage Trustee might be adjudicated to be only the amount of the difference between the earnings of the Western Pacific Company and the amount necessary for interest and sinking fund requirements, the dependent bill prayed that the true meaning of the contract in respect of the sinking fund payments should be declared; that an accounting of earnings of the Western Pacific Company from the time of the creation of the First Mortgage until the time of such accounting should be had; that the amount required to be paid or to be secured to be paid by the Denver Company in fulfillment of its obligations under the contract be adjudicated; and

"That the court find and declare the true meaning, construction and effect of the said Contract B in respect of the provision that the agreement shall run with the railways of the several companies named therein, and that said provision be enforced as against defendant the New Denver Company, in accordance with its true meaning and effect thus determined by the court. That in respect to the amount found, upon the accounting and adjudication hereinbefore prayed for, to be due from the Old Denver Company either under the said Contract B or under the said guaranties, this court decree and direct the payment thereof by the New Denver Company by a short day to be named by the court; that upon the failure of the New Denver Company to make such payment accordingly, the amount thereof be by the decree of this honorable court charged upon the property of the New Denver Company, and that all and singular the property and effects of the New Denver Company be sequestrated in aid of the said decree and in order to the enforcement and satisfaction thereof. That, in the same event, a receiver or receivers be appointed by the court to take possession of the railways and other property and franchises of the defendant the New Denver Company, and the earnings, income and proceeds thereof, with power to operate the said property, and with all such powers and authority as may be required to preserve the same until the sale thereof, as the same may be decreed and ordered by this honorable court, and to secure the earnings of such railroad property and franchises to the use of your orator and of the holders of said First Mortgage Five Per Cent. Thirty Year Gold Bonds of the Western Pacific Company."

FURTHER PROCEEDINGS IN THE COURT BELOW.

Upon being advised of the filing of this dependent bill in the District Court of the United States for the Southern District of New York, the Receivers filed in the court below, on the 4th day of June, 1915, their petition for instructions in respect of Contract B. The hearing upon this petition was had upon the 9th day of June, 1915, and continued on the following day, upon which day the court, of its own volition, and without being moved thereto by anybody, directed counsel for the Receivers to prepare an order directing the Equitable Trust Company as Trustee to show cause upon a given day why the dependent suit in New York should not be dismissed or its further prosecution by the Trustee stayed until the further order of the court; and, until the return day of that order, restraining the Trust Company from taking any further step of any nature in that suit. This order was entered by the court *sua sponte* on the 11th day of June, 1915, and was made returnable June 28th, upon which day and the two following days the matter was fully argued, orally, printed briefs being thereafter submitted by counsel for the Receivers on the one hand and counsel for the Equitable Trust Company on the other, no party to the suit other than the Trust Company having appeared in the matter. The decision of the court upon its order to show cause was rendered upon the 21st day

of February, 1916; and was, not only that the Equitable Trust Company should be enjoined from further proceeding with its dependent suit in New York and from bringing any further action or proceeding involving Contract B and from taking any other steps which might impair or affect the obligations or any of the provisions of the contract without first procuring the sanction of the court, but also that the Denver and Rio Grande Railroad Company and Missouri Pacific Railway Company be made parties to the suit and compelled respectively to interplead and respectively to set up any rights which they might have in the suit. An order to this effect was thereupon duly entered in the cause.

It is from that part of this order which enjoins The Equitable Trust Company of New York that the appeal now before this court is directed; and it is from that part of this order which directs that the Denver and Rio Grande Railroad Company and the Missouri Pacific Railroad Company be made parties to the suit and be compelled to interplead therein that the Application for a Writ of Prohibition now before this court is directed.

It should be added that no bondholder has ever demanded or requested that The Equitable Trust Company to pursue any other course than that which it has followed. No bondholder has ever requested or demanded that it should not follow the course which it has sought to follow.

PROCEDURE OF THE COURT UPON THE MOTION TO ENTER A DECREE.

To return to the proceedings of the court below upon the motion made by the solicitor for the Equitable Trust Company, upon the stipulation of all parties to the cause, for the entry forthwith of a decree in the form then submitted to the court, or, in the alternative, if that motion should be denied, that the cause be set for hearing and for the entry of such decree at such early day as the court should assign. In view of the stipulations which have been described, it is obvious that the motion did not meet objection from any party to the cause. It did, however, meet with objection by counsel for the Receivers, who, over the protest and objection of the solicitor for the Trust Company, was allowed to interpose an objection to the granting of the motion and, over like protest and objection, was allowed to adduce evidence and make argument in support of such objection. After some evidence, all of which had been duly objected to by the solicitor for the Trust Company, had been introduced by counsel for the Receivers, the court, likewise over the objection of the solicitor for the Trust Company and over the objection of such solicitor to the refusal of the court to act promptly upon the motion, and notwithstanding the assertion of such solicitor that such Trust Company was entitled to the granting of such motion as a matter of right, refused to grant such motion and,

of its own accord and without the motion of anybody so to do, continued the hearing to the 13th day of March, 1916, for the purpose of affording counsel for the Receivers further opportunity for the introduction of evidence and the making of argument in support of his objection to the granting of such motion.

It is to the refusal of the court to grant such motion and to enter such decree promptly that the Application for a Writ of Mandamus now before this court is directed.

ARGUMENTS IN THE COURT BELOW.

The only extended argument in the court below has been upon the return to the Order to Show Cause issued to the Equitable Company. In that argument counsel for the Receivers covered a wide range. Over one-third, however, of an argument covering about one hundred and thirty pages was devoted to the proposition that "The First Mortgage of Deed "of Trust of the Western Pacific by virtue of the "pledge of Contract B amount to an equitable lien "upon the properties of the Denver and Rio Grande, "and the bill in this case is sufficient to establish "and, if necessary, foreclose that lien." But their entire argument rested upon two untenable assumptions:—first, that Contract B is wholly a contract between the Western Pacific Company and the Denver Company; and that the moneys provided to be paid

by the Denver Company to the Trustee to supply the deficiency in interest and sinking fund requirements are assets of the receivership for which the Trustee is a mere "collection agent"; and, second, that the agreement by the Denver Company to pay money to the Trustee to supply such deficiency was pledged under the mortgage and is now in the custody of the court by its Receivers.

The argument for the Trust Company was that the right sought to be asserted by the Trust Company in its dependent suit in New York was not covered by the lien of the mortgage; and that the enforcement of that right would not in any manner affect the title, possession or control of the property in the possession of the court in this suit.

Because there was no motion before the court that either the Denver Company or the Missouri Pacific Company be made parties to the suit, no attention was paid by counsel for the Trust Company to the argument of counsel for the Receivers on the point that the Denver Company is an indispensable party.

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of New York, as Trustee.